ALL PERSONS IN OCCUPATION OF THE HOUSE AND THE WOODEN STORES ERECTED ON A PORTION OF LAND HELD UNDER GRANT NO: 26977 FOR LOT 4271 IN THE TOWNSHIP OF JOHOR BAHRU, JOHOR

v.

PUNCA KLASIK SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-872-1994]
12 MARCH 1996

CIVIL PROCEDURE: *Stay of proceedings - Special circumstances - Whether must be shown - Whether appeal if successful would be rendered nugatory - Consideration of See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors*

This was an application by the defendants for a stay of proceedings pending their appeal to the Court of Appeal against two earlier decisions of the instant court, one giving vacant possession to the plaintiff and the other denying compensation to the defendants. The defendants submitted that there was a vital issue of public interest to be argued before the Court of Appeal, *viz*, whether the defendants – who claimed to have a proprietary or equitable or contractual right in the land and who had remained in occupation thereon for 37 years – could be evicted through the summary procedure under O. 89 of the Rules of the High Court 1980 ('the RHC'). It was further contended that if execution was carried out, the defendants would suffer grave loss and would not be restored to their original position even if they succeeded in the appeal because damages would not be an adequate compensation for the destruction of their family home.

Held:

[1] Indeed, the defendants had failed to lodge an appeal against the earlier decision of the instant court giving vacant possession to the plaintiff; they had only lodged an appeal against the decision denying them compensation. In this context, applying either the 'special circumstances' test or the 'whether the appeal if successful would be rendered nugatory' test, there were no grounds to grant the stay of proceedings sought.

[2] The recent decision of the Court of Appeal in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* – which departed from the classical approach requiring 'special circumstances' before a stay of execution could

be granted in favour of the less stringent 'whether the appeal if successful would be rendered nugatory' test – was made without reference to two previous decisions of the Federal Court which were binding on it, *viz*, *Government of Malaysia v. Jasanusa Sdn Bhd* and *Kerajaan Malaysia v. Dato' Ghani Gilong*. These two Federal Court decisions had entrenched the 'special circumstances' test in respect of applications for stay of execution as well as for stay of proceedings, and the instant court was bound by them.

[Application for stay dismissed.]

Case(s) referred to:

Alexander v. Cambridge Credit Corp Ltd [1985] 10 ACLR 42 ***(refd)***
Bettinson v. Bettinson [1965] Ch 465 [1965] 1 All ER 102 ***(refd)***
Charanjit Lal Chowdhury v. The Union Of India And Others [1951] AIR SC 41 ***(refd)***
Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584 ***(refd)***
Close v. Steel Co Of Wales Ltd [1962] AC 367 ***(refd)***
Dickson Trading (S) Pte Ltd v. Transmarco Ltd [1989] 2 MLJ 408 ***(refd)***
Dyson v. AG [1911] 1 KB 410 ***(refd)***
Estate Ltd v. And Kheng [1953] MLJ 116 ***(foll)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(foll)***
Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(foll)***
Lawrance v. Lord Norreys [1890] 15 App Cas 210 ***(refd)***
Mohamed Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 ***(refd)***
Monk v. Warbey [1935] 1 KB 75 ***(refd)***
Osborne To Rowlett [1880] 13 CHD 774 ***(refd)***
Punca Klasik Sdn Bhd v. All persons In Occupation Of The Wooden House Erected On A Portion Of Land Held Under Grant No: 26977 For Lot 4271 In The Township Of Johor Bahru, Johor & Another Case [1995] 4 BLJ 337 ***(refd)***
Richard West & Partners (Inverness) Ltd v. Dick [1969] 2 Ch 424 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(not foll)***
Serangoon Garden Estate Ltd v. Ang Keng [1953] MLJ 116 ***(refd)***
Toh Kheng Heng & Anor v. Ahmad Fauzi Mohd Taufek [1994] 1 CLJ 547 ***(refd)***
Ward v. James [1966] 1 QB 273 ***(refd)***
Whu Shu Chen v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 89

For the appellants - Dominic Puthucheary (Sanjay with him); M/s Skrine & Co
For the respondent - Ng Chew Hor (Oon Lay Yean with him); M/s Leng & Co

Reported by Alex KC Lee

JUDGMENT

Abdul Malik Ishak J:

On 30 May 1995, I ordered vacant possession in favour of the respondent/ plaintiff (hereinafter.Pn2 referred to as *"Punca Klasik"*) pursuant to an application by Punca Klasik under O. 89 of the Rules of the High Court, 1980 ('RHC') and this is clearly reflected in the notes of proceedings as set out in encl. 14. A written judgment to that effect was handed down by me and this has since been reported (*Punca Klasik Sdn Bhd v. All persons in occupation of the wooden house erected on a portion of land held under grant no: 26977 for lot 4271 in the township of Johor Bahru, Johor and Another case* [1995] 4 BLJ 337). It is instructive to note that there was no appeal lodged in regard to the decision of this court dated 30 May 1995. On the issue of compensation, I had on 22 June 1995 ordered that no compensation was forthcoming to the appellants/defendants (see p. 19 of encl. 14) and this meant that my decision favoured Punca Klasik. On 18 July 1995 the appellants/defendants lodged an appeal against that part of my decision dated 22 June 1995 and the notice of appeal was worded in this fashion (see exh. "NEH 1" of encl. 22):

> NOTIS RAYUAN
>
> AMBIL PERHATIAN bahawa NG ENG HING Perayu yang dinamakan di atas, bercadang hendak merayu kepada Mahkamah Rayuan terhadap keseluruhan keputusan Yang Arif Dato' Hj. Abdul Malik bin Hj. Ishak yang diberikan di Johor Bahru pada 22 haribulan Jun 1995.
>
> Bertarikh pada 18 haribulan Julai 1995
>
> t.t
> ...
>
> Perayu
> Peguamcara bagi Perayu

I am now told that the appellants/defendants have since filed an application for an extension of time to file their notice of appeal in regard to my order dated 30 May 1995 to the Court of Appeal. In the meantime, by encl. 23 and supported by an affidavit in encl. 22, the appellants/defendants made an application for a stay of proceedings in order to preserve the integrity of the appeal against my order dated 30 May 1995.

A stay of proceedings arises under an order of the court and, in essence, it puts a stop to the further conduct of the proceedings. The order is generally discretionary in nature (*Bettinson v. Bettinson* [1965] Ch 465; [1965] 1 All ER 102) and generally made very sparingly and only in exceptional circumstances (*Lawrance v. Lord Norreys* [1890] 15 App. Cas 210 at p. 219)

or what is known in the local scene as special circumstances (*Whu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353) of which I have more to say later. It is true to say that the court will exercise great care and circumspection so as not to drive the "plaintiff from the judgment seat" when confronted with an application for a stay of proceedings pending an appeal (*Dyson v. AG* [1911] 1 KB 410 at p. 419 CA).

It was argued that there was a vital issue of public interest that will be canvassed before the Court of Appeal and it revolved on the question of whether a person who claims to have a proprietary right in land or a right in equity or a right in contract and who has stayed on the land for 37 years could be deprived of the right to stay there by a summary procedure under O. 89 of the RHC. It was submitted that the procedure envisaged in O. 89 of the RHC was not in accordance with law and that it infringed art. 13 of the Federation Constitution which provided that:

> 13. (1) No person shall be deprived of property save in accordance with law.
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

The RHC is a major source of procedural law in this country. It has statutory flavour in matters of procedure. To say that O. 89 of the RHC contravened art. 13 of the Federal Constitution seems to overlook the all important aspect of the RHC as a whole in that they are there to provide justice fairly and expeditiously. The RHC can never alter the substantive law (*Ward v. James* [1966] 1 QB 273) especially that part in regard to the compulsory acquisition of a registered proprietor's interest in land. An alienated land may be compulsorily acquired by the State Authority through the mechanism of the Land Acquisition Act, 1960. On the facts, the appellants/defendants here were not the registered proprietors of approximately 24 acres of land nor the miserable 11,625 square feet out of the 24 acres which they sought to lay claim. On the other hand, Punca Klasik was the registered proprietor of the entire 24 acres which included 11,625 square feet of land that was in issue. That the State Authority has the power to acquire cannot be denied and is best described by Bk Mukherjee J in *Charanjit Lal Chowdhury v. The Union of India and Others* [1951] AIR SC 41 especially at pp. 53 and 54 in the following words:

> It is a right inherent in every sovereign to take and appropriate private property belonging to individual citizens for public use. This right, which is described as eminent domain in American law, is like the power of taxation, an off-spring of political necessity, and it is supposed to be based upon an implied reservation by Government that private property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner.

The Land Acquisition Act, 1960 also makes provisions for the assessment of compensation to be made as a result of such acquisition and other matters incidental thereto. All said and done, no matter how attractive the arguments were fashioned in regard to O. 89 of the RHC which was said to infringe art. 13 of the Federal Constitution, yet these were not reflected in the affidavit of Ng Eng Hing in encl. 22 that was affirmed on 17 November 1995 in support of the application for a stay of proceedings pending the hearing of the appeal. Enclosure 22 adverted to the appeal that was lodged against the order dated 22 June 1995 and that the appeal has since been registered and given an appeal number by the Court of Appeal. It was deposed in encl. 22 that *Punca Klasik* and its agents were present at lot 4271 to execute the order dated 22 June 1995 for vacant possession of lot 4271 which included the appellants/defendants' premises. Here, I must point out that if the order was in regard to vacant possession it must be in relation to the order dated 30 May 1995 because the order dated 22 June 1995 was in relation to the issue of compensation. It was next deposed in encl. 22 that Ng Eng Hing's family members had stayed in the premises for more than 37 years and that there were other occupants of lot 4271 who are awaiting the outcome of the other suits and that *Punca Klasik* should take cognisance of this fact before they executed the order – and this must be in relation to the order dated 30 May 1995. Enclosure 22 also contained an averment that the appellants/defendants would suffer grave loss if the execution was carried out and should they succeed in the appeal they would never be put back to their original position; it was said that no amount of damages could possibly compensate them. Ng Eng Hing heavily relied on the special circumstances approach in encl. 22 to drive home the message that the family home was in jeopardy and, consequently, it was said that this court should exercise a discretion in favour of granting the stay pending the disposal of the appeal. It was deposed that there was merit in the appeal and that the matter was one of public importance. But what that public importance was never adverted to at all in encl. 22.

It was submitted that the law in regard to the grant of a stay of execution or a stay of proceedings has changed. My attention was drawn to the recent Court of Appeal case of *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 CA, where it was held that the court before whom a stay of execution or a stay of proceedings was filed no longer need to examine whether there were special circumstances in existence but rather must consider that unless the stay was granted the appeal, if successful, would be rendered nugatory ("the nugatory approach"). Indeed that was a robust approach and Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal in See Teow Guan summarily buried, so to speak, the decision of Brown J in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116 where the special circumstances approach was propounded when his Lordship said (p. 606):

> The authority constantly relied upon in support of the proposition that special circumstances ought to be demonstrated before a stay of execution may be granted is the judgment of Brown J. in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116. For my part, having considered the more recent authorities on the subject, I have come to the conclusion that that decision is bad law, and ought no longer to be followed by this Court.

Now, what were "the more recent authorities" his Lordship Gopal Sri Ram considered in *See Teow Guan*? His Lordship Gopal Sri Ram considered the Singapore's High Court decision of Chan Sek Keong JC (as he then was and now the Attorney-General of Singapore) in the case of *Dickson Trading (S) Pte Ltd v. Transmarco Ltd* [1989] 2 MLJ 408, the decision of Abdul Hamid J (who rose as our Lord President) in *Mohamed Mustafa v. Kandasami (No. 2)* [1979] 2 MLJ 126 and the case of *Alexander v. Cambridge Credit Corp. Ltd* [1985] 10 ACLR 42 to conclude that (at p. 610):

> If upon balancing all the relevant factors, this Court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the status quo.

With respect, See Teow Guan did not consider the Federal Court cases of *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 FC and *Kerajaan Malaysia v. Dato' Hj. Ghani Gilong* [1995] 3 CLJ 161 FC. These two authorities from the highest Courts in the country, in no uncertain terms, entrenched the special circumstances approach in the context of a stay of execution of a judgment and, I may add, a fortiori it must also be extended to apply to an application for a stay of proceedings in order to preserve the integrity of an appeal.

Edgar Joseph Jr FCJ, in delivering the judgment of the Federal Court in *Jasanusa* agreed with the special circumstances approach in granting a stay as applied by Ian Chin J (see [1993] 3 MLJ 514). In fact his Lordship Edgar Joseph Jr FCJ, in Jasanusa quoted in verbatim passages from the decision of Ian Chin J in regard to the special circumstances approach and concluded in erudite terms at p. 117 as follows:

> With respect, we considered that there was ample material for the learned judge to have exercised his discretion by extending the order for stay and his decision to do so was in no way contrary to his earlier ruling to grant a limited stay.
>
> It is well settled law that the exercise of such a discretion will be interfered with by an appellate Court only in exceptional circumstances; for example, where it has been demonstrated that the decision of the judge below is shown to have depended on an erroneous basis of law or fact or where no reasonable explanation is open save that the decision depended on an erroneous basis of

law or fact. More particularly, the fact that we, as an appellate Court, might have exercised the discretion differently is beside the point and will not constitute a sufficient ground for overturning the judge's decision to grant the limited stay.

Applying the above principles to the circumstances of the present case, we considered that there were no grounds upon which we would have been justified in interfering with the learned judge's exercise of discretion in extending the order for stay.

The result, therefore, was that at the conclusion of the arguments, we had dismissed this appeal with costs.

In *Dato' Hj. Ghani Gilong*, Edgar Joseph Jr FCJ speaking for the Federal Court emphasised the special circumstances approach when his Lordship succinctly said:

We noted, that in the instant appeal, there was no formal application for stay supported by an affidavit affirmed by the taxpayer or his duly authorized agent, alleging special circumstances to justify the making of the order for stay. In other words, although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the judge could have granted the order for a stay.

I will now address my mind to the principle of "stare decisis" or what is commonly known as the principle by which a court is bound to follow decisions in former cases. The use of precedent is an indispensable tool in a Court of Law. It is an indispensable foundation upon which the judge is to decide what is the law and what is its application to individual cases. The only thing that I can see in a judge's decision binding as an authority is the principle upon which the case was decided: *Osborne to Rowlett* [1880] 13 ChD 774 at 785. In my considered view, judicial authority belongs not to the exact words used nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision (*Close v. Steel Co of Wales Ltd* [1962] AC 367; [1961] 2 All ER 953 HL). Thus, the enunciation of the reason or principle upon which a question before the court has been decided is said to be binding as a precedent. What constitutes binding precedent is the *ratio decidendi* and this is ascertainable by an analysis of the material facts of the case. It is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the *ratio decidendi* of the case (*Monk v. Warbey* [1935] 1 KB 75 at p. 78 HL). It is germane to mention that mere passing remarks of a judge are known as "*obiter dicta*", whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the *ratio decidendi*, have been termed as "judicial dicta" (*Richard West & Partners (Inverness) Ltd v. Dick* [1969] 2 Ch 424 at p. 413; [1969] 1 All ER 289 at p. 292). With respect, the decision

in *See Teow Guan* in respect of the approach to be adopted when confronted with an application for a stay at best can be described as *"obiter dicta"*. *See Teow Guan* jettisoned the special circumstances approach in favour of the nugatory approach without considering the decisions of the Federal Courts in *Jasanusa* and *Dato' Hj. Ghani Gilong*. On the principle of *stare decisis*, I am bound by the two decisions of the Federal Courts and, consequently, the special circumstances approach was adopted by me.

The special circumstances approach which merited a stay was also vigorously applied in *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 2 CLJ 584, *Toh Kheng Heng & Anor v. Ahmad Fauzi bin Mohd Taufek* [1994] 1 CLJ 547 and *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor (supra)*. Be that as it may, even if I were to apply *See Teow Guan* in that the stay should be granted so as not to render the appeal by the appellants/defendants nugatory in the event the appeal would be successful as suggested by the learned counsel for the appellants/defendants, I must not lose sight of the fact that the notice of appeal was in relation to the question of compensation and this was in relation to my order dated 22 June 1995. Emphasis must also be laid to the failure by the appellants/defendants to demonstrate by affidavit evidence that the appeal would be rendered nugatory in the event the appellants/defendants succeeded in the appeal. There was also an absence of any averment that *Punca Klasik* was not in a position or without any financial means to satisfy any compensation that may be awarded to the appellants/defendants by the Court of Appeal in the event the appeal against the order dated 22 June 1995 was successful. Thus, in the absence of any evidence to the contrary, I must assume that *Punca Klasik* is not insolvent. Since there was no appeal in regard to my order dated 30 May 1995, the arguments that the appellants/defendants had stayed in the house for 37 years, that the appellants/defendants were not illegal squatters and had legal rights, that the building if destroyed would deprive the family of a place to stay, that inconvenience, hardship and oppressive circumstances would prevail in that the appellants/defendants would find it difficult to find an alternative accomodation must surely be nothing more than an exercise in futility. These cannot be considered to be special circumstances. There was no need to put the appellants/defendants back to their original position because by not appealing against the order dated 30 May 1995, it must be presumed that they were happy with the order for vacant possession granted in favour of *Punca Klasik*. The affidavit in support of the stay in encl. 22 too did not advert to O. 89 of the RHC which was said to infringe art. 13 of the Federal Constitution and, consequently, the submission on this point can best be described as an afterthought. Bluntly put, it was an embellishment and nothing else. It was also an embellishment when it was submitted that the conditions under which the land was sold to *Punca Klasik* must be looked into as this was not adverted to at all in encl. 22.

Next, it was argued that the notice of appeal filed in regard to the decision dated 22 June 1995 must surely encompass the decision dated 30 May 1995 on the basis of the words "terhadap keseluruhan keputusan" that appeared in the notice of appeal. With respect there was no merit to this argument. One may circumvent this argument by advancing a question that: if that is the case why must the appellants/defendants file an application for extension of time to file their notice of appeal to the Court of Appeal in regard to the order dated 30 May 1995 unless the appeal that was filed on 18 July 1995 related to the decision dated 22 June 1995?

Whichever approach I adopt, be it the *See Teow Guan* approach or that as propounded by Brown J in *Serangoon Garden Estate Ltd* which subsequently became entrenched in *Jasanusa* and *Dato' Hj. Ghani Gilong*, the end result would be the same. In the exercise of my judicial discretion there was no material demonstrated in the affidavit for a stay of the proceedings as sought for by the appellants/defendants. In a long judgment as reported in [1995] 4 BLJ 337, I have considered all the points raised by all parties before I gave the decisions dated 30 May 1995 and 22 June 1995. Even if there was an appeal in regard to my decision dated 30 May 1995, which was not the case here, that by itself cannot constitute special circumstances (*Wu Shu Chen v. Raja Zainal Abidin bin Raja Hussin (supra)*). As NH Chan J (now JCA) said in *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd (supra)* at p. 43:

> Merits or strong grounds for an appeal are also not special circumstances. In *Atkins v. G.W. Ry* [1886] 2 TLR 400, Lord Esher MR said:
>
> '... but that there were strong grounds for an appeal was no reason, for no one ought to appeal without strong grounds for doing so.'

In another part of his judgment, NH Chan J (now JCA) in the same case said (p. 43 right hand column at E):

> In other words, grounds affecting the validity or correctness of the judgment or order appealed from are not special circumstances.

For the reasons adumbrated above, I dismissed encl. 23 with costs. The appellants/defendants' counsel quickly orally applied for an interim stay of my order to enable him to apply direct to the Court of Appeal on a certificate of urgency. I refused his application.